

# Information Privacy Law Fall 2016

Prof. Julie Cohen

## Administrative Matters

### Required Reading:

- McGeeveran, *Privacy and Data Protection Law* (Foundation, 1st ed. 2016) (“CB”).
- Supplemental readings/documents: Right now, there is only one supplemental reading (for Class 17), but the casebook is new, and so it’s possible that I may add something as we go along. If I do, I’ll announce it on the Canvas site, and the reading will be available on the Canvas site either as a file or via a link.
- Background readings: **These are optional!** I’ve included them for those wanting a deeper dive into particular topics.

### Class Schedule:

- Class will not meet on the following days:
  - Tues.-Thurs., Oct. 18-20
  - Tues., Nov. 22
- We will make up the cancelled classes by extending the length of six regular classes. ***The extended classes will start at 1:20 p.m. instead of 1:55 p.m.*** The six extended class dates are:
  - Thurs., Sept. 22
  - Tues., Sept. 27
  - Thurs., Oct 13
  - Thurs., Nov. 10
  - Tues., Nov. 15
  - Thurs., Dec. 1
- Please note that the reading assignments for the extended classes will be longer, so that we can cover the same material that we would have read using the default class schedule.

### Office Hours and Contact Information:

- Office hours are Wednesdays, 1-3 p.m., and other times by appointment. My office is McDonough 410.
- Please note that office hours will be cancelled on Weds., Oct. 12 (for Yom Kippur) and Weds., Oct. 19.
- You can reach me at 202-662-9871 or jec@law....

## Course Requirements

### Grading Policy

- In general, your course grade will be based on your midterm, your final exam, and your attendance and participation (see details below). However, I will make adjustments to your course grade in the following circumstances:
  - Failure to post your required discussion memo by the applicable deadline: Downward adjustment of one-half grade.
  - Class participation of extraordinarily high quality: Upward adjustment of one-half grade.

### Midterm Exam

- A midterm exam, which will count for 30% of your grade, will be administered on a self-scheduled basis between Mon., Oct. 17, and Fri., Oct. 21.
- The midterm will consist of six short answer questions covering the material in the first half of the course.
- The midterm will be open-book. *You will be asked to sign an honor code statement affirming that you have not discussed the exam with any other person and that the word count you have reported is correct.*
- **MIDTERM INSTRUCTIONS:** The midterm will be administered via the “Quizzes” section of the Canvas site according to the following procedure (which I will also discuss in class the week beforehand).
  - **Timing of the Midterm:** The document will be available via the Canvas system between 9:00 a.m. on Mon., Oct 17 and 5:00 p.m. on Fri., Oct. 21.
  - **Duration of the Midterm:** You will have three and one-half (3½) hours from the time you first access the midterm to complete it and upload the document containing your answers. However, your answers must be uploaded by 5:00 p.m. on Fri., Oct. 17. Therefore, if you download the midterm after 1:30 p.m. on Friday, you will have less time to complete it.
  - **Accessing the Midterm:** Click on the “Quizzes” heading in the left-hand menu bar, and then click on “Midterm.” You will see two tabs: “Details” (a summary page with instructions) and “Questions.” After reviewing the instructions, click on “Questions.” *You will see only “Question 1.” Fear not! Click there to access a page containing all six exam questions.* (This is to make your life easier on the back end – instead of having to upload six separate documents, you will upload one document containing all of your answers.)
  - **Taking the Midterm:** Copy/paste the six questions into a Word document on your own computer and begin work.
    - Please think, organize, and prioritize carefully before you write, and please proofread your answers. Cogent, well-structured answers will be graded more highly; poorly-organized, ungrammatical, or chronically misspelled answers will receive

lower grades. Please do not waste space by restating the question or the facts of cited cases.

- **Citation to relevant cases, statutes, and secondary materials assigned for this course is required in order to receive full credit.** Please indicate why the cited materials are relevant. You do not need to use Bluebook form.
- **Canvas Login and Time Counter:** *You do not need to remain logged in to Canvas* for the entire 3½ hours. The system will continue to keep track of your time. (While in the “Quizzes” area, you should see a time counter in small font on the right-hand area of your screen.) When you are ready to upload, just log back in, click on “Quizzes,” and then on “Midterm.” Select “Resume” and then follow the prompts to upload your file.
- **Word Limit on Answers:** Your completed midterm should be 2000-2200 words, or about 7-8 double-spaced pages. Answers exceeding the word limit will be marked down by half a grade for every 50 words over the limit. **Please type or write the word count at the start of your document.**
- **Anonymization:** I have set up the quiz functionality for anonymous grading, BUT that will work only if you help. **Please follow the same protocol that the GULC Registrar uses for takehome exams:** (1) do not include your name or any other identifying information in the body of your document; and (2) go into the “Properties” section of your file and remove any identifying information that is there.
- **Upload Problems:** If you lose connectivity or experience any other problem and cannot upload your exam by the deadline, please take the following steps in order: (1) don’t panic; (2) don’t open your document again as it is important to preserve the timestamp indicating when it was last saved; (3) email the file plus a brief note of explanation to Angie Villareal in Faculty Support **OR** if you have lost email connectivity, copy/paste the file to a flash drive and bring it to school at the start of the next business day; (4) email me a copy of THE NOTE ONLY (not the file, or I won’t be able to grade it anonymously).

## Final Exam

- The final exam, which will count for 60% of your grade, will be an eight-hour take-home exam on Thurs., Dec. 15.
- The exam will consist of:
  - a set of six short answer questions covering the material in the second half of the course (30% of overall grade); and
  - a selection of at least two essay questions on topics drawn from the entire course, from which you should answer whichever **one** of the questions you prefer (30% of overall grade).
- In total, your exam may not exceed 4500 words. Answers exceeding the word limit will be marked down by half a grade for every 50 words over the limit.

## Discussion Memos

- **What:** During the semester, each of you will be required to post *one* short (<300 words), informal “discussion leader” memo. The memo should discuss some issue(s) relevant to the assigned readings for the next day’s class meeting and pose some questions for class discussion.
- **Where:** Please post your memo in the “Discussion” section of the Canvas site.
- **When:** Memos must be posted by 8 p.m. (Eastern time) on the day before the class for which they are assigned. On Weds., Sept. 8, I will distribute and post on the Canvas site a list with the memo assignments for each remaining class. The first memos will be posted for Class 5, which will meet on Tues., Sept. 13.
- **Why:** The memos help me to determine which issues you find most compelling and which issues may require more clarification. They also give you a different kind of opportunity to be heard in class (which helps me get to know you a little better). Please treat your classmates’ memos as part of the course reading assignment for that day.
- **Effect on Grade:** The memos will not be graded. *A memo will affect your grade only if you fail to post it by the required time. Failure to post a memo by the applicable deadline will reduce your course grade by half a grade.* If you foresee that you will be unable to post your memo on the appointed day, you may arrange a trade with another member of the class. However, I must be notified of all trades at least 24 hours before the memo is to be posted. If you experience technical difficulties when trying to post, please notify me by e-mail or voicemail, and please post your memo as soon as possible.

## Class Attendance and Participation

- I expect consistent attendance, preparedness, and active participation. If you cannot avoid being absent or will be unprepared, please notify me in advance by email.
- Please come to class on time, and please do your part to ensure a professional environment in the classroom. Laptops are expected and welcome, but please do not use them for purposes unrelated to class.
- Class attendance and participation are worth 10% of your grade. I will assess participation based on quality, not simply quantity. I do recognize that some students are quicker and more eager to volunteer than others. I appreciate that, but I also will make an effort to make sure that others’ voices are heard.
- While much class participation will be voluntary, some class participation will be conducted on a random on-call basis. I appreciate that being questioned in class is not always the most enjoyable experience, but it is important practice for fielding questions from supervisors, clients, and judges. Please know that my intent is to have a thoughtful conversation among reasonable adults. I encourage you to take the time you need to reflect while answering, and to ask for clarification as needed.
- In my discretion, I will adjust final course grades upward by half a grade for class participation of extraordinarily high quality.

## Syllabus

### I. Foundations of Privacy Law

- Class 1 (Aug. 30): The Fourth Amendment
  - CB 3-43
  - Background reading (optional):
    - Jane Bambauer, “Hassle,” 113 *Mich. L. Rev.* 461 (2015), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2404088](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2404088).
    - Matthew Tokson, “Knowledge and Fourth Amendment Privacy,” 111 *Nw. U. L. Rev.* (forthcoming 2016), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2746534](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2746534).
  
- Class 2 (Sept. 1): The First Amendment; Substantive Due Process
  - CB 43-66
  - Background reading (optional):
    - Daniel J. Solove, “The First Amendment as Criminal Procedure,” 82 *N.Y.U. Law Rev.* 112 (2007), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=924900](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=924900).
    - Neil Richards, *Intellectual Privacy* (Oxford University Press, 2014) (introduction available as a free download on ssrn.com), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2554196](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2554196).
  
- Class 3 (Sept. 6): Other Constitutional Systems
  - CB 66-86
  - Background reading (optional):
    - Julie E. Cohen, “What Privacy Is For,” 126 *Harv. L. Rev.* 1906 (2013), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2175406](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2175406).
  
- Class 4 (Sept. 8): Tort Foundations; Intrusion Upon Seclusion
  - CB 87-111
  - Background reading (optional):
    - Margot E. Kaminski, “Regulating Real-World Surveillance,” 90 *Wash. L. Rev.* 1113 (2015), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2681128](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2681128).
  
- Class 5 (Sept. 13): Disclosure of Private Facts; Appropriation and Publicity Rights
  - CB 111-40
  - **Begin reading discussion memos, posted by 8 pm the night before each class.**
  - Background reading (optional):
    - Danielle Keats Citron, “Mainstreaming Privacy Torts,” 98 *Cal. L. Rev.* 1805 (2011), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1582949](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1582949).

- Class 6 (Sept. 15): False Light; Limits on Tort Liability
  - CB 140-63
  - Background reading (optional):
    - Frank Pasquale, “Reforming the Law of Reputation,” 47 *Loyola U. Chi. L.J.* 515 (2015),  
[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2727955](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2727955).
  
- Class 7 (Sept. 20): Privacy Policies and Self-Regulation; Consumer Lawsuits
  - CB 165-99
  - Background reading (optional):
    - Alessandro Acquisti, Laura Brandimarte & George Loewenstein, “Privacy and Human Behavior in the Age of Information,” 347 *Science* 509 (2015),  
<http://science.sciencemag.org/content/347/6221/509.full?ijkey=R7zkYwoe8MFog&keytype=ref&siteid=sci>.
    - Lauren E. Willis, “When Nudges Fail: Slippery Defaults,” 80 *U. Chi. L. Rev.* 1155 (2013),  
[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2142989](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2142989).
  
- Class 8 (**EXTENDED CLASS: Sept. 22, 1:20-3:20**): FTC Enforcement
  - CB 200-47
  - Background reading (optional):
    - Daniel J. Solove & Woodrow Hartzog, “The FTC and the New Common Law of Privacy,” 114 *Colum. L. Rev.* 583 (2014),  
[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2312913](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2312913).
    - Chris Jay Hoofnagle & Jan Whittington, “Free: Accounting for the Costs of the Internet’s Most Popular Price,” 61 *UCLA L. Rev.* 606 (2014),  
[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2235962](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2235962).
  
- Class 9 (**EXTENDED CLASS: Sept. 27, 1:20-3:20**): European Union Data Protection Law
  - CB 257-302
  - Background reading (optional):
    - Christopher Kuner, “The European Commission’s Proposed Data Protection Regulation: A Copernican Revolution in European Data Protection Law,” *BNA Bloomberg Privacy & Security L. Rep.*, Feb. 6, 2012, pp. 1-15,  
[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2162781](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2162781).
    - Christopher Kuner, et al., 2014 update on proposed GDPR,  
<http://www.kuner.com/my-publications-and-writing/untitled/bna-article-january-2014.pdf>.
    - Bert-Jaap Koops, “The Trouble with European Data Protection Law,” 4 *Int’l Data Privacy L.* 250 (2014),  
[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2505692](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2505692).

## II. The Life Cycle of Data

- Class 10 (Sept. 29): Collection: Cookies; ECPA (begin)
  - CB 327-55
  - Background reading (optional):
    - Julie E. Cohen, “The Biopolitical Public Domain,” working paper 2015, [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2666570](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2666570).
- Class 11 (Oct. 4): Collection: ECPA (cont’d)
  - CB 356-80
  - Background reading (optional):
    - Orin S. Kerr, “The Next Generation Communications Privacy Act,” 162 *U. Pa. L. Rev.* 373 (2014), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2666570](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2666570).
- Class 12 (Oct. 6): Processing
  - CB 381-411
  - Background reading (optional):
    - Paul Ohm, “Broken Promises of Privacy: Responding to the Surprising Failure of Anonymization,” 57 *UCLA L. Rev.* 1701 (2010), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1450006](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1450006).
    - Solon Barocas & Andrew Selbst, “Big Data’s Disparate Impact,” 104 *Cal. L. Rev.* 671 (2016), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2477899](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2477899).

**- Midterm covers material up to this point -**

- **No class Tues., Oct. 11 – GULC will follow a Monday schedule**
- Class 13 (**EXTENDED CLASS: Oct. 13, 1:20-3:20**): Storage and Security
  - CB 413-55
  - Background reading (optional):
    - Adam J. Levitin, “Private Disordering? Payment Card Fraud Liability Rules,” 5 *Brooklyn J. Corp., Fin. & Comm’l L.* 1 (2010).
    - Browse the Essays on *Schneier on Security*, <https://www.schneier.com/essays/>.
- **No class Tues.-Thurs., Oct. 18-20**
- Class 14 (Oct. 25): Disclosures and Transfers
  - CB 475-503, 514-19
  - Background reading (optional):
    - Anupam Chander, “Facebookistan,” 90 *N.C. L. Rev.* 1807 (2012), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2061300](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2061300).

- William McGeeveran, “Friending the Privacy Regulators,” 58 *Ariz. L. Rev.* (forthcoming 2016), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2820683](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2820683).
- Class 15 (Oct. 27): Speech Protections for Disclosures
  - CB 520-47
  - Background reading (optional):
    - Jane R. Bambauer, “Is Data Speech?,” 66 *Stan. L. Rev.* 57 (2014), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2231821](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2231821).
    - Julie E. Cohen, “The Zombie First Amendment,” 56 *Wm. & Mary L. Rev.* 1119 (2015), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2473798](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2473798).

### III. Sector-Specific Regulation

- Class 16 (Nov. 1): National Security Surveillance Authority and Limits
  - CB CB 551-78
  - Background reading (optional):
    - Laura Donohue, “The Limits of National Security,” 48 *Am. Crim. L. Rev.* 1573 (2011), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2132563](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2132563).
    - Laura Donohue, “FISA Reform,” 10 *I/S: J. L. & Pol’y for Info. Soc’y* 1 (2014), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2395526](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2395526).
- Class 17 (Nov. 3): The Communications Metadata Controversy
  - CB 578-610
  - Explore Julia Angwin & Jeff Larson, “The NSA Revelations All in One Chart,” *ProPublica.org*, June 30, 2014, <http://projects.propublica.org/nsa-grid/>
  - Background reading (optional):
    - Laura Donohue, “The Dawn of Social Intelligence (SOCINT),” 63 *Drake L. Rev.* 1061 (2015), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2693689](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2693689).
    - Christopher Slobogin, “Panvasive Surveillance, Political Process Theory, and the Nondelegation Doctrine,” 102 *Geo. L.J.* 1721 (2014), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2428391](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2428391).
- Class 18 (Nov. 8): Hacking and Cybersecurity; International Data Transfers
  - CB 456-74
  - CB 503-14
  - Background reading (optional):
    - Christopher Kuner, “Reality and Illusion in EU Data Transfer Regulation Post-*Schrems*,” University of Cambridge Faculty of



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[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2732346](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2732346).

- Anupam Chander & Uyen P. Le, “Data Nationalism,” 64 *Emory L.J.* 677 (2015),  
[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2577947](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2577947).
- Andrew Crocker, “What to Do About Lawless Government Hacking and the Weakening of Digital Security,” *EFF.org*, Aug. 1, 2016, <https://www.eff.org/deeplinks/2016/08/what-do-about-lawless-government-hacking-and-weakening-digital-security>.
- Class 19 (**EXTENDED CLASS: Nov. 10, 1:20-3:20**): The Privacy Act; FOIA
  - CB 611-49
  - Background reading (optional):
    - Margaret B. Kwoka, “FOIA, Inc.,” 65 *Duke L.J.* 1361 (2016),  
[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2801251](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2801251).
- Class 20 (**EXTENDED CLASS: Nov. 15, 1:20-3:20**): Employment and Privacy
  - CB 665-714
  - Background reading (optional):
    - Pauline T. Kim, “Data-Driven Discrimination at Work,” 58 *Wm. & Mary L. Rev.* (forthcoming 2017),  
[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2801251](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2801251).
- Class 21 (Nov. 17): Health Information
  - CB 752-88
  - Background reading (optional):
    - Craig Konnoth, “Classification Standards for Health Information: Ethical and Practical Approaches,” 72 *Wash. & Lee L. Rev. Online* 395 (2016),  
[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2787288](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2787288).
    - Matthew R. Langley, “Hide Your Health: Addressing the New Privacy Problem of Consumer Wearables,” 103 *Geo L.J.* 1641 (2015), <http://georgetownlawjournal.org/files/2015/08/Langley-Final.pdf>.
    - William F. Pewen, “Protecting Our Civil Rights in the Era of Digital Health,” *The Atlantic*, Aug. 2012,  
<http://www.theatlantic.com/health/archive/2012/08/protecting-our-civil-rights-in-the-era-of-digital-health/260343/>.
- **No class Tues., Nov. 22**
- Class 22 (Nov. 29): Financial Records
  - CB 789-818
  - Background reading (optional):
    - Richard W. Rahn & Veronique de Rugy, “Threats to Financial Privacy and Tax Competition,” *Cato Policy Analysis* No. 491 (Oct.

- 2, 2003), <http://www.cato.org/publications/policy-analysis/threats-financial-privacy-tax-competition>.
- Luke Harding, “What Are the Panama Papers: A Guide to History’s Biggest Data Leak,” *TheGuardian.com*, Apr. 5, 2016, <https://www.theguardian.com/news/2016/apr/03/what-you-need-to-know-about-the-panama-papers>.
- Class 23 (**EXTENDED CLASS: Dec. 1, 1:20-3:20**): Communications and Marketing; Children’s Online Privacy
    - CB 819-59
    - Skim CB 302-11
    - Background reading (optional):
      - Ryan Calo, “Digital Market Manipulation,” 82 *Geo. Wash. L. Rev.* 995 (2014), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2309703](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2309703).